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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 468 (GHW)

5 JAMES GRANT and  
6 JEREMY REICHBERG,

7 Defendants.

-----x

8  
9 May 18, 2018  
10:30 a.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 United States Attorney for the  
Southern District of New York

16 KIMBERLY RAVENER

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Attorneys for Defendant Reichberg

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(Case called)

THE DEPUTY CLERK: Counsel, please state your names for the record.

MS. RAVENER: Kimberly Ravener, Jessica Lonergan, and Martin Bell for the government.

THE COURT: Good morning.

MS. NECHELES: Good morning, your Honor. Susan Necheles and Kate Cassidy for Mr. Reichberg, who is here in court.

MR. MERINGOLO: Good morning, your Honor. John Meringolo and Anjelica Cappellino for Mr. Grant, to my right.

THE COURT: Thank you very much.

Good morning.

Thank you all for being here. There are a number of things on my agenda for the conference today which I would like to review with you now.

The principal thing that I want to talk about is the government's ongoing efforts to unravel the mystery that was surfaced by counsel for defendants regarding failure to disclose wiretaps.

I would like to hear about where we are with respect to that and to talk about where we will go from here based on the information that you are going to provide.

We also did not complete our discussion of the subpoena for the accounting records. I was also not able to

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1 talk about the Touhy regulation compliance issue.

2 Also, I think that we have the opportunity as a result  
3 of the unfortunate adjournment to talk about the defense  
4 exhibits issue with a little more focus. And also I want to  
5 talk about the prospect of using a questionnaire given the  
6 unfortunate adjournment of our trial. And also we may have the  
7 opportunity to talk more about the motion in limine from  
8 October 8 on Cox and Prostitute-1.

9 Everything other than the documents issue I will call  
10 it subsidiary. So I would like to start with that. Is there  
11 anything else that the parties would like to raise before we  
12 begin?

13 First counsel for the United States.

14 MS. RAVENER: No, your Honor.

15 THE COURT: Counsel for Mr. Reichberg.

16 MS. NECHELES: Did your Honor include deadlines? Are  
17 we going to talk about deadlines?

18 THE COURT: We will come up with deadlines. Let me  
19 just make a comment about that.

20 We did have deadlines for discovery in the case at the  
21 time that we had our early conferences. The government as a  
22 result of this issue that we are talking about now clearly did  
23 not produce all of the documents by the deadlines that I  
24 established.

25 We adjourned the trial in large part because of the

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1 option that I exclude this late disclosed set of evidence was  
2 not viable. I understood the proceeding to trial with this  
3 evidence excluded wasn't viable because the defense strategy  
4 was structured in part on the absence of certain calls and that  
5 the unearthing of this evidence undermined that basic defense  
6 strategy.

7 So we will set some deadlines today, I expect, but I  
8 just wanted to comment that we had deadlines previously and the  
9 reason why simple enforcement of those deadlines was not an  
10 adequate remedy is that would have prevented our adjournment.

11 Counsel for Mr. Grant, anything else that you would  
12 like to add?

13 MR. MERINGOLO: Nothing else.

14 THE COURT: Let's talk about what is happening with  
15 the status of the government's investigation regarding the  
16 nondisclosed wires.

17 Counsel for the United States.

18 MS. LONERGAN: Yes, your Honor. Earlier this week,  
19 specifically on Tuesday, we produced to defense counsel the  
20 entirety of the wiretap for both Reichberg and Rechnitz. In  
21 connection with that we provided a cover letter explaining the  
22 number of breakdown, which I will put on the record now because  
23 I think it will help the court understand some of the issues.

24 So with respect to the Reichberg wire, there is a  
25 total of 10,677 sessions. The line sheets that we provided had

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1 every session from 1 to 10,677.

2 We also produced 6,095 audio files.

3 THE COURT: Can you say that number again?

4 MS. LONERGAN: 6,095. And in explaining the gap,  
5 here's the gap. So there are five privileged audio files. We  
6 did not produce those. We are working on getting the  
7 privileged audio files to counsel for defendant Reichberg only.

8 There are 4,565 sessions with no audio content.

9 There's one corrupted audio file which we did not  
10 produce because it was corrupted.

11 And there is one administrative or test audio file.  
12 It is just a file that says something like hello. And that was  
13 also not produced. They are testing the wire.

14 With respect to the Rechnitz wire, there is a total of  
15 7,936 sessions.

16 We produced 5,032 audio files.

17 There are 79 privileged audio files and 2,825 sessions  
18 with no audio content.

19 In addition, not on Tuesday but later this week, we  
20 produced to defense counsel the line sheets in a spreadsheet  
21 format, which is searchable and sortable. It contains almost  
22 every field that's on the line sheets. The one field that it  
23 does not contain is the field called content. That's the  
24 description of the call. Because it couldn't be -- the way  
25 that the spreadsheet is generated, we weren't able to pull

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1 that. There is a content column. What is in the content  
2 column is a link, and that link goes to a Word document that  
3 contains the content. And we produced all of those Word  
4 documents as well.

5 I want to be clear. The numbers I just gave, that's  
6 not all new. That's the entirety of the wires. So we thought  
7 that what would simplify this whole process, given the  
8 difficulties of production previously, was just to produce the  
9 entirety of the wire, of each of these wires, in one so that,  
10 for example, counsel could see the way we did that the line  
11 sheets have every session from one to the final session of the  
12 wire without any gaps.

13 THE COURT: Thank you.

14 What is the explanation for the gap in the  
15 government's prior production?

16 MS. LONERGAN: Your Honor, just so I can be clear, are  
17 we talking about the production of approximately two years ago  
18 or the production within the last two weeks, or both?

19 THE COURT: The production of approximately two years  
20 ago, and to the extent there is a gap between what the  
21 government more recently produced and what you just described,  
22 I would be interested in hearing that too.

23 MS. LONERGAN: With respect to what was produced two  
24 years ago, as I think we have previously explained, so there  
25 are a number of different classifications on each session.

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1 There are a classifications pertinent and nonpertinent and  
2 privileged. Then there are a number of other classifications,  
3 such as voice mail, no content audio, and others.

4 The production two years ago produced only those  
5 sessions and audio that had been classified either pertinent or  
6 nonpertinent, and none of the other texts. So that's the  
7 explanation for the gap from two years ago.

8 It was based on a misunderstanding between the  
9 government and the FBI about the existence of those tags  
10 besides pertinent, nonpertinent and privileged.

11 Then with respect to approximately two weeks ago, when  
12 we tried to remedy this situation, initially we thought it  
13 might be simpler in terms of volume not to give defense  
14 counsel --

15 THE COURT: Can I just stop at this point.

16 How many of the 10,000 plus for Reichberg and 7,000  
17 plus for Rechnitz, how many of those were not produced as part  
18 of the government's initial disclosure?

19 MS. LONERGAN: Your Honor, what I have are the numbers  
20 of audio files that were not initially produced. But as I was  
21 about to explain, there was a gap.

22 So with respect to audio files on Reichberg's wire,  
23 there was just over 2200. And on Rechnitz' wire, the number of  
24 audio files was just over 2100.

25 That includes audio files of any size, audio files,

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1 many of which had almost no content. It might be the voice  
2 mail message got cut in half. It might be just the phone  
3 ringing. It might be someone saying hello. So that's all  
4 audio files that were not produced initially.

5 THE COURT: Can I just pause you on that.

6 During our last conference, Ms. Necheles raised a  
7 question regarding the compliance by the government with any  
8 minimization protocols. How would you respond to that?

9 As I understand it, in addition to marking recordings  
10 as pertinent and nonpertinent, there are other tabs. Can you  
11 tell me what those other tabs are and how they are used and how  
12 that fits within the minimization protocol.

13 MS. LONERGAN: Your Honor, so classification is  
14 entirely separate from minimization. I will give the court an  
15 example.

16 A call could be classified as privileged and the  
17 monitoring agent could still minimize it. It wouldn't  
18 necessarily make sense to do so, but again, the way that a call  
19 or an incoming call is classified has nothing to do with  
20 whether or not the agent can or can't minimize it.

21 So, for example, on the newly produced calls, we see  
22 some that were minimized, despite the fact that they have the  
23 classification unknown, and that means that the agents in  
24 listening to them have determined that that was a call that  
25 should be minimized.



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1           So these things are in some ways -- they are not -- I  
2     can understand why intellectually it seems like you should make  
3     a determination and classify the call before determining  
4     whether or not to minimize, and I am not in the FBI agent's  
5     head so I don't want to do more than speculate. But it seems  
6     to me that a call that has not yet been classified but is  
7     minimized, the agent has determined that was a call that should  
8     be minimized despite the fact that the agent has not classified  
9     that call by clicking a button to classify it.

10           THE COURT: Do we know that an agent was present at  
11     the time that each of these calls was recorded?

12           MS. LONERGAN: Yes, your Honor. So when they are not  
13     in the room, the calls cannot be -- there is no audio  
14     recording.

15           THE COURT: Thank you.

16           Is this a common practice? In other words, I  
17     understand the government did not know in this case, the group  
18     of experienced prosecutors did not know in this case that there  
19     were tabs other than pertinent, nonpertinent, and privileged.  
20     Is this a common practice by the FBI to use other designations?

21           MS. LONERGAN: Your Honor, I can't speak to that.  
22     That would have to be a question that we would have to ask of  
23     the FBI.

24           THE COURT: In this case I take it that the  
25     government, meaning the prosecution team lawyers, only

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1 requested files that were marked pertinent, nonpertinent or  
2 privileged?

3 MS. LONERGAN: Your Honor, one moment.

4 THE COURT: Please, take your time.

5 Ms. Necheles, as the government is conferring, do you  
6 have a copy of the minimization protocol that was in place  
7 here?

8 MS. NECHELES: I don't know that I have an extra copy,  
9 but perhaps there is someone who can make a copy.

10 THE COURT: Can I just borrow it for purposes of this  
11 conversation. I will hand it back.

12 MS. NECHELES: I am handing up two things. One is the  
13 order of interception, which I have tabbed, and actually marked  
14 the minimization part of the order.

15 The other are the wiretap monitoring and minimization  
16 instructions, which I understood the government had written up  
17 for the people who were monitoring.

18 THE COURT: Thank you.

19 Counsel for the United States, just let me know  
20 whenever you're ready.

21 MS. LONERGAN: Yes, your Honor. So none of the  
22 prosecutors sitting at this table were the prosecutors who  
23 actually communicated with the FBI about the production of the  
24 wire. The first wire we produced in this series of related  
25 cases was the Peralta wire, and that was the entirety of the

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1 wire.

2 As we mentioned, the wires for Reichberg and Rechnitz  
3 with respect to discovery were run by a different agent and the  
4 government was not aware that a different practice had been  
5 done by the FBI in terms of running the wire for production.

6 THE COURT: Thank you.

7 Thank you for that, counsel. Please go on and tell me  
8 more about the discrepancy, if any, between the more recent  
9 production and two weeks ago production and the most recent one  
10 produced by the government to the defense.

11 MS. LONERGAN: Yes, your Honor.

12 I am trying to take something that's a little bit  
13 complicated and break it down.

14 So there are two different fields that I want to talk  
15 about in the line sheets. One field is called classification  
16 and the other is called content.

17 Classification is the field that, my understanding is,  
18 the agents fill that out. That's what we have been talking  
19 about, pertinent, nonpertinent, etc.

20 Content is a field that's filled out by the computer.

21 In the classification field, one of the  
22 classifications was no audio/content. In the content field,  
23 the computer either writes I think audio or none.

24 So when we produced what we believe to be the entirety  
25 of the wire within the last two weeks before the most recent

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1 production, what we produced was all sessions associated with  
2 audio files that had not previously been produced. So that  
3 means that what was filtered out was anything where the  
4 computer has written Content: None.

5 So if the classification was no audio but the computer  
6 had a file there, that got produced. If the content, the  
7 computer said there was no audio file associated with that  
8 session number, which happens, as the court can see, many  
9 thousands of times, those were not produced in the recent  
10 production before this one.

11 That is why I believe that when defense counsel  
12 provided those spreadsheets to the court last week there were  
13 still gaps. Because what had not been filled in was session  
14 numbers in which the computer said Content: None.

15 THE COURT: I may drill down on that further.

16 I would like to come back to pertinent, nonpertinent.  
17 I am working at the wiretap monitoring minimization  
18 instructions and I would just like to understand the  
19 government's position on this further.

20 The version of the minimization instructions that I am  
21 looking at is the set of instructions signed on January 10,  
22 2015, by Assistant U.S. Attorneys Jacob and Bell.

23 The minimization instructions define pertinent  
24 communications at Section B, that Section B of the order.

25 The order or instructions define pertinent

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1 communications as communications you may listen to. So those  
2 are what are pertinent communications.

3 Then there is a requirement that if, under (c)(1), in  
4 the two-minute pertinent communication rule, it reads: "You  
5 should listen to the beginning of each communication only as  
6 long as necessary to determine the nature of the communication  
7 and in any event no longer than two minutes unless the  
8 communication is 'pertinent.' That is, a 'criminal  
9 communication' within the scope of our authorization. If you  
10 determine that the communication is not a criminal  
11 communication, turn the machine off (both the listening and  
12 recording devices)."

13 So I want to understand what the government's view is  
14 regarding these categories other than pertinent, because the  
15 minimization instruction appears to state that pertinent  
16 communications are those that the agents can listen to, and if  
17 they are not determined to be pertinent, then the recording is  
18 to be turned off.

19 So what are these other categories and how is it that  
20 the recording of them complied with the minimization  
21 instructions?

22 MS. LONERGAN: Your Honor, one moment.

23 (Government counsel conferred)

24 THE COURT: Ms. Necheles, while the government is  
25 conferring, do you have a copy of the application that's

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1 associated with the order of interception?

2 MS. NECHELES: Yes, your Honor. One minute.

3 MS. LONERGAN: Your Honor, if I may.

4 THE COURT: Please do.

5 MS. LONERGAN: Our understanding is that what the  
6 statute requires is minimization. The statute doesn't require  
7 classification. Classification is a tool that certainly helps  
8 everyone in the process, but, for example, it's our position  
9 that if no call was ever classified, no classification was ever  
10 done, but that calls were properly minimized, that would not be  
11 a violation of the statute. Because the purpose of the statute  
12 is to prevent as -- the case law is aware that there is going  
13 to be interception and overhearing of some private  
14 conversations. The purpose of minimization is to try to reduce  
15 that to the extent possible.

16 The instructions are a way to help the agents make  
17 these realtime decisions about whether or not a call should be  
18 minimized.

19 So, for example, the calls in the system, the default  
20 is unknown. If an agent is listening to a call, has not  
21 classified it but has determined that it is pertinent, the  
22 agent, our position would be, would be allowed to continue  
23 listening to it because the point is whether or not the call is  
24 actually related to the criminal activity, evidence of the  
25 criminal activity.

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1           Similarly, if the agent has not tagged a call as  
2 nonpertinent but the call is in fact nonpertinent, the agent  
3 should be minimizing.

4           So our position is what is really at issue is  
5 minimization, not classification. Classification is a tool  
6 that assists in minimization.

7           We have no reason at this point to believe -- as we  
8 said, some of these calls that we are seeing on the newly  
9 produced materials were in fact minimized, even though they  
10 were tagged unknown. So we have no reason to believe here that  
11 the production failure, which is what I think happened here,  
12 equates in any way to a problem with minimization.

13           THE COURT: Thank you.

14           To be clear, as I understand it, the government's  
15 position is that a recording can be pertinent and that an agent  
16 can make a determination that a call is pertinent and therefore  
17 continue to listen to it in compliance with the terms of the  
18 minimization instructions even if they do not mark it as  
19 pertinent. They can mark it as anything other than  
20 nonpertinent and it's still in compliance with the minimization  
21 instructions.

22           MS. LONERGAN: I think what we are speaking about is  
23 compliance with the statute. The minimizations instructions I  
24 think are a way to help the agents in realtime comply with the  
25 statutory requirements. I have not seen -- the case law

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1 research we have done to date, the minimization instructions  
2 are of course a relevant consideration to a court in  
3 considering whether minimization was properly done, but what  
4 the court is really looking at is whether there was compliance  
5 with what the statute required rather than the instructions.

6 THE COURT: Thank you.

7 Counsel, do you have the application?

8 MS. NECHELES: I do, your Honor. It's for the January  
9 10, which I believe is what your Honor has. I have the  
10 affidavit in support of it as well.

11 THE COURT: I understand why the government is focused  
12 on the statute in the event that defense makes a motion with  
13 respect to this. I will focus on that separately as well.

14 Right now I am trying to get a sense of what in fact  
15 happened and how that comports with the structure that is  
16 outlined in the minimization instructions and may, as I am  
17 about to assess, be embedded in the court's order to the extent  
18 that the process is set forth in the government's application  
19 for the order and the affidavit submitted in support of the  
20 application. The court orders interception to be conducted in  
21 a manner as set forth in the government's application for the  
22 order and the affidavit submitted in support of the  
23 application.

24 So I am looking now to see whether or not the process  
25 described in the wiretap monitoring minimization instructions



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1 are also included in the application to see whether or not the  
2 government complied with the order of minimization.

3 MS. LONERGAN: Your Honor, to the extent that the  
4 court just said to determine what actually happened, I don't  
5 think that the right people to answer those questions are  
6 before the court today. Although we are involved in  
7 communicating with the agents about how to monitor a wire, we  
8 are not the people who are in the wire room. We are not the  
9 people who are making these decisions. And we are not able to  
10 speak with firsthand knowledge about minimization.

11 We can look at line sheets to determine whether calls  
12 were in fact or not minimized. That shows up on a line sheet.  
13 But again, to the extent it's important to the court what  
14 exactly was happening in the wire room, respectfully, we don't  
15 feel comfortable representing the decisions that the agents  
16 were making beyond what is on the wire sheet.

17 THE COURT: Thank you. I am not asking for that at  
18 this point, although we may dig into it depending on whether or  
19 not it's necessary, if it's the subject of an application by  
20 the defense.

21 The thing I want to make sure I understand is what the  
22 government understands its minimization instructions to  
23 require.

24 This minimization instruction is executed by the  
25 assistant U.S. attorneys involved. I take it from your

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1 comments earlier that the government was not aware there were  
2 markings other than pertinent communications that would  
3 constitute evidence of illegal activities. Those terms are  
4 defined in (b)(1) of the minimization instructions to basically  
5 be congruent.

6 So what I can ask the people who are here, who signed  
7 the minimization instructions, is whether you understood that  
8 there were -- are you expecting that conversations reflecting  
9 illegal activities would be marked as pertinent pursuant to the  
10 terms of the minimization instructions as opposed to something  
11 else?

12 MR. BELL: Your Honor, I am one of the undersigned  
13 assistant U.S. attorneys. Our understanding was that the  
14 pertinent classification would be what your Honor just  
15 described it as from the instructions, yes. We did not have an  
16 understanding of there being sort of a broader universe of  
17 correspondence that would involve substantive communications,  
18 including recordings potentially probative of illegal activity  
19 articulated in the application.

20 THE COURT: Thank you. That makes sense based on the  
21 language of the order, or the instructions.

22 Ms. Necheles, is there a fact that you wanted to bring  
23 to my attention?

24 MS. NECHELES: Yes, your Honor. We have reviewed this  
25 over the week and also did legal research, not a lot. Your

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1 Honor, I am not an expert in wiretap. It's been a while. It's  
2 about six years since I had a wiretap case that I made a motion  
3 on. I did make a new chart. So if I could hand up to your  
4 Honor and give to the government my new chart. Two charts.

5 THE COURT: Thank you. Please do.

6 MS. NECHELES: The one thing that we realized as we  
7 were going through the data -- what I have handed up are two  
8 charts. One is with respect to Jeremy Reichberg's phone and  
9 one is with respect to Jona Rechnitz's phone. And the key, the  
10 colors, are on the one that has multicolors.

11 So what we realized is that the categories have been  
12 changing. That since the time that these were initially  
13 produced to us, these categories apparently have changed on the  
14 line sheets.

15 THE COURT: Give me one moment. I am going to mark  
16 the spreadsheet that you have handed to me, that is two pages  
17 in length and has multiple color coding in the chart, as Court  
18 Exhibit A for purposes of today's conference.

19 I am going to mark the one-page spreadsheet in which  
20 everything is highlighted in yellow as Court Exhibit B for  
21 purposes of this conference.

22 Please proceed.

23 MS. NECHELES: So A is the one with the multiple  
24 colors, your Honor?

25 THE COURT: Yes.

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1 MS. NECHELES: So what we were told just a little  
2 while ago by the prosecutor is that initially -- and what we  
3 were told before as well -- is that initially everything gets  
4 marked unknown, or that's the default, and then other things  
5 get marked, gets marked pertinent, nonpertinent. And I had  
6 understood from the minimization instructions, which you have  
7 before you, your Honor -- I am not positive, but I  
8 understood -- that at the end of every day, within 24 hours,  
9 whatever line sheets there were were produced to the assistant  
10 who was monitoring the wire. Because every ten days a  
11 description had to be put into the report, ten-day report, to  
12 keep the wire going. So they needed to know what was going on  
13 in this wire. It was based on that description that they would  
14 put together the report. I understood that from the  
15 minimization instructions.

16 THE COURT: Thank you. I'm sorry. I have your copy  
17 of it. Do you recall the section to which you're referring?

18 MS. NECHELES: No, I do not. If you hand it to me, I  
19 can try to locate it.

20 Page 13, item G3.

21 THE COURT: Thank you.

22 Please proceed.

23 MS. NECHELES: Based on that, I would have thought  
24 that the assistants would have seen there was a pertinent and  
25 nonpertinent.

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1           In addition, what the minimization instructions say,  
2           and the order and, I believe, case law -- I went back and did  
3           some research this week -- that the only thing that the  
4           assistants and the investigative team are allowed to review are  
5           the pertinent calls. The nonpertinent calls, according to the  
6           minimization instructions, are not to be disseminated, and I  
7           think it's according to the order as well, are not to be  
8           disseminated to the investigative team. In fact, I have a  
9           different order in front of me, but I think it's the same  
10          format.

11           THE COURT: The language of it is as follows. I will  
12          note or highlight as I read this the word choice. It says:  
13          "In particular, electronic communications that do not appear to  
14          be criminal in nature and are marked as 'nonpertinent' messages  
15          that appear to be privileged and are marked as privileged are  
16          to be secured ..."

17           MS. LONERGAN: Hopefully I can cut through this.  
18          There is a difference, an incredibly important difference,  
19          between wire calls and electronic communications. The language  
20          the court has read applies only to electronic communications  
21          and not to wire calls.

22           THE COURT: Thank you very much.

23           Please go ahead, Ms. Necheles.

24           MS. NECHELES: I know that when I did a little  
25          research what I seemed to see was a case that actually I had

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1 litigated a bunch of years ago and had forgotten about, and  
2 what I think that it suggested was, if I could just refer the  
3 court to it, was that, what the case suggested was that the  
4 government should not be reviewing nonpertinent conversations.  
5 And the case was United States v. -- my client's name was  
6 Neuman, N-E-U-M-A-N. I think the name of the case was  
7 Liebowitz. I do not have the citation here. Yes, I do.  
8 United States v. Liebowitz, 11 Cr. 134 (2012). I have the  
9 Lexis cite, which is 2012 U.S. Lexis 189705, at pages 52-58.

10 So I haven't done extensive research on it. But it  
11 certainly indicates in the minimization instructions that it  
12 was important to mark things pertinent and nonpertinent and  
13 that nonpertinent things would not to reviewed by the team.

14 In addition, if you go back to the chart, what this  
15 chart shows, and let me start with A, everything that is  
16 yellow -- what we have been told by the government is that the  
17 only categories produced to the defense at first were pertinent  
18 and nonpertinent documents or wiretaps. But among the new  
19 things that were produced to us are things that are marked  
20 pertinent. So when we look at this, we think, gee, I guess  
21 that was changed, that category was changed. So that's what we  
22 have marked as yellow, not previously produced, that the  
23 category on the line sheets that we have now received is  
24 pertinent.

25 So taking the government at their word I am assuming

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1 that these were all were changed.

2 In addition, we can see that some of the line sheets  
3 that were produced to us before, which were marked pertinent  
4 before are now marked nonpertinent. Those are the green ones.

5 And some of them that were marked pertinent before are  
6 now marked no audio. We haven't checked them.

7 And one of them that was marked before nonpertinent is  
8 now marked pertinent.

9 In fact, I have with me that line sheet, and I only  
10 have one copy. I made a copy of the first version we got and  
11 the second version that we received. I will show it to  
12 government and then ask to hand it up. It's a line sheet for  
13 session 10,407.

14 Can I hand this up now?

15 THE COURT: Please do.

16 MS. NECHELES: That is a conversation between, I  
17 believe it was Mr. Reichberg and an individual named Murray  
18 Huberfeld, who is a defendant in the companion case.

19 The first page of what I handed up to your Honor is  
20 the original line sheet that we received which shows  
21 nonpertinent. The second page is the new line sheet where it's  
22 marked pertinent.

23 THE COURT: Thank you. I see that there is a  
24 parenthetical following the comments on the second version of  
25 the line sheet. It doesn't appear on the first page?

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1 MS. NECHELES: Yes, your Honor.

2 THE COURT: Thank you.

3 Counsel for the United States, how do you respond to  
4 the charts that Ms. Necheles has presented? I just will read  
5 the parenthetical which reads, "Discussion about Gilead  
6 post-analysis July 27, '17," with some initials which appear to  
7 be the initials of the user who prepared that line sheet, who  
8 is a different individual from the user who prepared the first  
9 line sheet.

10 How do you explain the modifications, which are  
11 apparent here? It doesn't fit into the construct that you gave  
12 me earlier.

13 MS. LONERGAN: Your Honor, I will respond to the  
14 court's question, but then I want to make broader point.

15 As the court can see from the line sheet, the call was  
16 in fact minimized. That is what is appropriate. There is no  
17 impropriety. The initial listener designated nonpertinent and  
18 minimized it. A case agent who was more familiar with the  
19 facts then went back in, listened to it or looked at it and  
20 determined that it was pertinent. But even though it was  
21 pertinent, we are not able to get back that minimized audio.

22 Again, what the agents are required to do is minimize  
23 when they determine, based on their understanding of the case,  
24 that a call is nonpertinent, and that was what was done here.

25 So, in fact, Ms. Necheles's example shows that the



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1 agents were complying with the minimization instructions.

2 THE COURT: Can I ask about that, though. And I have  
3 handed back the copies of the materials to Ms. Necheles and her  
4 colleagues. I am not going to ask for them back.

5 Is it the government's understanding that documents  
6 that are marked as nonpertinent and are minimized are available  
7 for future review by members of the prosecution team?

8 MS. LONERGAN: If they are wire calls, of course. And  
9 that what is clear in every iteration of minimization  
10 instructions.

11 The reason, if I may, the reason that there is a  
12 difference between wire calls and electronic communications is  
13 as follows: Wire calls, as the court is aware from this  
14 discussion, spill over a period of time. So there is a period  
15 of time in which a case agent can make a pertinence  
16 determination and then they can, if it seems nonpertinent, can  
17 minimize and spot check, as is required in the minimization  
18 instructions.

19 An electronic communication, however, like a text  
20 message, just exists. It just is. You can't minimize a piece  
21 of it and then go back. It's just a text message.

22 So unlike with a wire call, there is no way to  
23 minimize a portion of a text message to then go back and figure  
24 out and check it again. That's why they are treated  
25 differently. Because a text message, once seen, is just seen.

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1 But for a wire call, because it lasts for a period of time, it  
2 can be minimized.

3 Your Honor, if I may make a broader point, which is  
4 that we are committed to getting to the bottom of any issues  
5 regarding this wire. We have responded to the court's  
6 questions. We have responded to defense counsel's questions.

7 What is happening in these conferences is defense  
8 counsel is doing good work and raising questions, but they are  
9 giving them to the government in realtime. We are not sitting  
10 here with a copy of the wire and we can't answer these  
11 questions in realtime.

12 We are happy to continue to engage in any process that  
13 is necessary, but there is a couple of ways to do that. One is  
14 for defense counsel to pose questions to us, not in this court  
15 setting in which we don't actually have any of the materials we  
16 need to answer the questions. And we will do our best to get  
17 the information to them.

18 The other is if they believe that the wire was  
19 monitored improperly, they should move on that and then we can  
20 respond to their motion through an opposition brief and, if  
21 necessary, engage in any further fact-finding.

22 But this process in which they continue to bring  
23 charts before the court and then the government is put on the  
24 spot to try to answer the questions, can't get answers to  
25 anyone's satisfaction in the moment, and then we have to come

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1 back a week later, this seems at this point to be a  
2 never-ending process.

3 THE COURT: Thank you. Just to make a editorial  
4 comment on that.

5 I agree with you that this is not necessarily the best  
6 forum for the parties to work together to find out what  
7 happened. And I agree that conversations outside of the  
8 context of the court hearing may be productive. But there is a  
9 more fundamental issue here, which is the credibility of the  
10 government with respect to these discovery issues.

11 The court and counsel relies on the thoroughness of  
12 the United States Attorney's Office with respect to production  
13 of things like Brady materials, with respect to things like  
14 production of Title III line sheets, with respect to things  
15 like 3500 materials. The court and defense counsel rely on  
16 this.

17 The protocol that you're describing in order to  
18 resolve these issues is very reasonable. At the same time, the  
19 issue, in part, is that the government, I expect, will provide  
20 complete and thorough answers and complete and thorough  
21 discovery responses without the need for such intense scrutiny  
22 by defense counsel. Defense counsel should not need to do the  
23 kind of work that they are doing here. And the court should be  
24 able to rely on the work done by the government. And for  
25 whatever else we can say about the process the defense is using

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1 to bring these to the court's attention, it does undermine the  
2 faith in the adequacy of the government's productions.

3 So I hope that you appreciate that this is not a game  
4 of gotcha. The government has an obligation to the court and  
5 to the parties to be complete and thorough in its reviews.  
6 These issues should ideally not be surfaced by the defense  
7 because they shouldn't exist.

8 So I don't take issue with the defense's work to bring  
9 these gaps to my attention. I think it will be more productive  
10 if the parties have the conversation outside of court time.  
11 But this is not an issue caused by the defense. This is a gap  
12 caused by the United States' failure to produce all of the  
13 responsive documents and timely.

14 I think we need to keep this in the right frame. And  
15 I think the correct frame is to recognize this discovery snafu  
16 is not a product of the defendants' inaction. It's the  
17 consequence of their trust in the government's prior production  
18 and affirmations to them.

19 MS. LONERGAN: We agree with the court wholeheartedly.  
20 We take our obligations seriously and it should not have fallen  
21 upon the defense to bring these to the government's attention.  
22 Again, I don't know what else we can say about that except that  
23 we agree that this was not the way that any of this should have  
24 unfolded.

25 What we are saying now is, with every question that

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1 the defense is posing to us, we are doing our best to, as  
2 quickly as possible, get to the bottom of it. With respect to  
3 these new charts, this is a question that we can discuss with  
4 defense counsel, but we do not believe that the change in  
5 classification of calls shows any sort of deficiency in the  
6 wire or in the way that the wire as monitored.

7 Again, as the example that defense counsel handed up  
8 to the court shows, the agents were acting completely in  
9 compliance with the instructions. So, again, this is something  
10 that we agree there are things that -- it's not about the  
11 defense bringing things to our attention. That's not the way  
12 the process is supposed to work. But, for example, change in  
13 classification is not necessarily something that we would  
14 affirmatively raise with the defense counsel because we believe  
15 that it is appropriate and proper for classifications to be  
16 changed upon further review.

17 Again, if defense counsel calls us with questions,  
18 that they are seeing something in the wires that they don't  
19 understand or think is problematic, it is our intention to make  
20 all efforts to answer those questions.

21 With the court's other comments with respect to Brady  
22 material, 3500, Giglio, again, we do understand our  
23 obligations. We have gone back and forth. There has been a  
24 lot of discussion in the court. The court is aware of the  
25 volumes of materials that we have already produced. To the

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1 extent that there are additional materials generated between  
2 now and the newly scheduled date for trial, we will take the  
3 same approach in producing everything we think falls under any  
4 of those categories. And we are going to do what we did  
5 previously, which is in an abundance of caution produce  
6 statements of every witness whether or not we intend to  
7 actually call that person and with enough time for defense  
8 counsel to make use of those statements.

9 THE COURT: Thank you.

10 I appreciate those comments and I will just comment  
11 briefly.

12 The government provided a number of witness statements  
13 as, quote-unquote, 3500 materials to the defense. As I  
14 understand it from our prior conversations, those,  
15 quote-unquote, 3500 materials related to statements made by  
16 people who were not witnesses and therefore might not, strictly  
17 speaking, be categorized properly as 3500 materials.

18 It may be in part because of that disconnect that the  
19 defense is concerned that the government was not providing  
20 information that they assert to be Brady materials. In other  
21 words, if these are not witness statements, why are you  
22 providing them to us under the guise of 3500 materials?

23 You also understand that the defense has raised  
24 concerns as a result of what I will characterize as the  
25 overproduction of Mr. Reichberg's discovery. So there are

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1 reasonable concerns that the defense has articulated regarding  
2 the overproduction of information that is not, hate to say it,  
3 pertinent, because it forces the defense to look for a needle  
4 in the haystack instead of giving them the needle.

5 That's been a concern throughout the course of the  
6 case and I think more cooperative communications between the  
7 parties regarding what it is that the government is producing  
8 and why and what the government thinks is being provided out of  
9 abundance of caution as opposed to because you believe that  
10 it's relevant to the charges in the case might be helpful to  
11 avoid future controversy.

12 Good. Let me ask, with respect to these issues, Ms.  
13 Necheles, what else would you ask for the court to do at this  
14 time? I don't take issue with the fact that you're raising  
15 these things now. I recognize the court conferences frequently  
16 generate activity on the part of the lawyers who are appearing  
17 in court. I also want to encourage the parties to continue to  
18 work outside of court.

19 What is your proposal here?

20 MS. NECHELES: I understand. I want to be clear, your  
21 Honor. We asked specifically, and we have documents of this  
22 and we had outside conversations with the prosecutors. One of  
23 the prosecutors that is here today was actively involved in the  
24 production and in conversations and in writing letters about  
25 what has been produced. And these things weren't produced.

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1 We will be making a motion based on that.

2 We ask that the records not be changed anymore. I  
3 feel like I am stunned to see these changes in records. What  
4 it effectively means is there are all these line sheets that  
5 are now characterized as pertinent which were never turned  
6 over. I don't even understand this process, how this could be  
7 happening.

8 What we were originally told was that we had been  
9 given originally all the pertinent stuff, they just didn't  
10 gives us the other stuff that includes pertinent stuff. Now it  
11 turns out there are things that have since been marked as  
12 pertinent. When were they going to give that to us? I don't  
13 understand what has gone on in this case.

14 I have always understood the line sheets to be a  
15 record of what the agents were noting then. I am really  
16 disturbed to see that they are changing over time and that they  
17 have been changed over time. I have spoken to a number of  
18 people. No one I know has ever heard of this happening before.  
19 It is of great concern to me.

20 I am going to ask that an audit report be created to  
21 see when things were changed. I don't understand the  
22 distinction that the prosecutor made in court today. Maybe I  
23 don't totally understand the law. I am not an expert on  
24 wiretap. I believe, however, that there is an issue here with  
25 respect to what was being marked, whether they were following



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1 the order. I do not think that the prosecutors can just say  
2 it's an answer that we are not required to do that by the  
3 statute.

4 I think a process has been worked out, that courts  
5 rely on those processes when they issue the orders, and one of  
6 the reasons to suppress a wiretap is failure to follow the  
7 order. Not just the statute, but failure to follow the wiretap  
8 order. There seems to me there was a wholesale failure to  
9 follow the wiretap order here and that we do still do not have  
10 all of the answers to this.

11 I do feel at this point that I need to bring these  
12 concerns to the court and put them on the record because  
13 without that I feel like I don't get answers to these things.  
14 We have asked for answers. I don't understand how the  
15 prosecutors can stand up here and say we don't have someone  
16 here who knew what was going on when one of the assistants  
17 sitting there is a person who was signing the minimization  
18 order, putting in the things to the court, was the person who  
19 represented to us that they had produced all of the wiretap  
20 materials when we specifically asked for it back in, I believe,  
21 2016.

22 THE COURT: Thank you.

23 I am going to ask the government now about whether or  
24 not there is a way for them to audit the modifications to the  
25 line sheets that have been provided to the defense. Then I am

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1 going to ask whether we can set a clear deadline for completion  
2 of production of these inquiries.

3 I would like to put in place a meet-and-confer date  
4 for the parties to talk about the government's disclosures and  
5 then counsel for defense, to the extent there is a motion that  
6 you want to bring, I would just ask you to write me about it  
7 and I hope that we will be able to set a schedule for it based  
8 on written correspondence without the need to bring the parties  
9 back in.

10 MS. NECHELES: Yes, your Honor. Also, I think another  
11 area we were going to get an answer to, and I haven't heard it,  
12 is about the large number of calls that were never taped, even  
13 though they should have been.

14 THE COURT: Counsel for the United States, can I ask,  
15 is there a way that you can provide the defense with a  
16 comprehensive assessment or statement of where line sheets have  
17 been modified after the date of the initial line sheet? The  
18 one that Ms. Necheles brought to my attention earlier, which I  
19 should mark for purposes of this conference, and I will do so  
20 now, as Court Exhibit C.

21 Ms. Necheles brought this one to my attention. It's  
22 clear there was a, quote, post-analysis with respect to this  
23 line sheet by a separate agent that's noted on the line sheet.

24 Is there a way for you to audit that?

25 MS. LONERGAN: We don't know, your Honor. We will

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1 have to check with the FBI. We don't know.

2 I know Ms. Necheles asked the court to order that the  
3 agent stop changing their classifications. We would oppose  
4 that request. The reality is at this point defense counsel has  
5 the entirety of the wire. Again, our position, and defense  
6 counsel can clearly make whatever motion they think is  
7 appropriate, but our position is really what is at issue is  
8 minimization, which they can see has nothing to do with  
9 classifications. You can see that the calls will say minimized  
10 and there will be a gap in the audio. That is not going to  
11 change. There is no way to ex-post go back and unminimize  
12 calls that were minimized. When they are minimized, that audio  
13 is just gone forever.

14 Again, as everyone, the investigative team's  
15 understanding of this case evolves, which happens, this is in  
16 realtime and we interview witnesses and we learn additional  
17 things. It may be that a call that previously appeared to be  
18 nonpertinent is now determined to be pertinent. That's not  
19 what is at issue here. What is at issue here, again, is  
20 whether or not that call was in the first instance properly  
21 minimized or not.

22 So in light of the fact that, as the government has  
23 represented to the court this is an ongoing investigation,  
24 there is a possibility we can interview a witness who is  
25 intercepted on the wire. All of the sudden we have a new

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1 understanding of a wire call.

2 Again, the defense now has the entirety of the wire  
3 with the audio. So to the extent that the government changes  
4 its opinion about whether or not a call is pertinent, we can  
5 let defense counsel know if we do that, but we don't think it's  
6 appropriate to say that the calls can no longer be changed in  
7 classification.

8 We also think in some ways that it doesn't actually  
9 have any sort of real world implications in this way. It's our  
10 position that a call, whether marked pertinent or nonpertinent,  
11 if it is in fact evidence of the crime and properly minimized,  
12 can be played at trial. So in that way the classification  
13 doesn't necessarily have any bearing at this point. Again, the  
14 real issue is minimization.

15 THE COURT: Understood.

16 Counsel for the United States, can you please write me  
17 promptly, let's say by Tuesday of next week, the 22nd, to let  
18 me know whether you can create an audit of the line sheets that  
19 can be provided to the defense to show where and when it has  
20 been that the line sheets have been modified. I think that  
21 that would be very useful for them, because as you have pointed  
22 out, they were provided with the universe of documents almost  
23 two years ago and that universe of documents may have changed  
24 in terms of the classification between then and now in order to  
25 allow them to efficiently process the discovery. I think it's

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1 appropriate for the United States to provide that kind of an  
2 audit trail to them. They are obviously doing it sort of in a  
3 reverse engineering way, as illustrated by Exhibits A and B,  
4 but I think if the government has that information it would be  
5 very valuable and efficient if you could produce it to the  
6 defense.

7 So please let me know by Tuesday whether or not that's  
8 possible.

9 I am not going to order that the government not make  
10 future modifications to their categorization, but I will direct  
11 that in the event that such a modification is going to be made  
12 that the defense be informed of it. Again, because the defense  
13 is working with a set of line sheets and a particular  
14 understanding of the categorization of these calls, to the  
15 extent that the government is modifying them, I think it would  
16 be valuable for that information to be made available to the  
17 defense in order to assist in their review.

18 Yes.

19 MR. BELL: Your Honor, just to flesh out a couple of  
20 other quick things.

21 As I think your Honor appreciates at this time, the  
22 government was under the impression that the entirety of wire  
23 recordings had been produced well earlier over the course of  
24 this litigation.

25 With that, with the production of that audio and with

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1 the production of those line sheets would come a preserved  
2 record of how things were marked at the time. And that too is  
3 something that we understood had actually been, not only  
4 produced but also in the running of the wire memorialized along  
5 those lines.

6 In circumstances such, there is -- Ms. Lonergan I  
7 think has already very eloquently explained why the  
8 classification itself is of relatively little legal moment even  
9 at the time its done. If the classification changes later on  
10 after that snapshot, if you will, of the wire and  
11 classifications that were assigned at the time, it's of even  
12 less legal moment. The agents are making the adjustments that  
13 they are largely for, I would imagine -- and we can check on  
14 this -- internal organizational purposes.

15 Being able to, as Ms. Lonergan noted, establish as  
16 time goes on whether a call that had been thought to have no  
17 meaning now has meaning, this is particularly the case, your  
18 Honor, in a suite of investigations that have sprung from this  
19 core set of facts along the lines of what your Honor has I  
20 think some appreciation of which happened here. This started  
21 out, the wire, as a relatively discrete inquiry into the  
22 activities of Mr. Peralta and mushroomed to a degree into  
23 investigations of multiple other categories of criminal  
24 activity, each of which was complex in some way, and ultimately  
25 manifested itself not only in the charging of this case but in

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1 the charging of Seabrook/Huberfeld case, charging of Hamlet  
2 Peralta's case, and other cases that were less grounded in this  
3 particular wire.

4 I note this in part because, at least in part, because  
5 Ms. Necheles continues to return to the core, I guess what she  
6 classifies as the core fact, that this is stuff that has been  
7 asked for for several years or a couple of years which the  
8 government has only made clear recently. I hope it's clear at  
9 this point that at the time we made the earlier productions we  
10 thought that the wire had come out.

11 The versions of the wire that were, as it turns out,  
12 not entirely complete were versions of the wire that the  
13 government itself had received from the FBI, that we ourselves  
14 had been working off of in preparing the road to trial. I feel  
15 compelled to say something about that on the record if only  
16 because Ms. Necheles keeps referring to and I think on some  
17 level not accurately characterizing what it is that actually  
18 happened there.

19 THE COURT: Understood. Let me just say this and this  
20 is more of an editorial comment than anything else.

21 Regardless of the legal consequences of what we are  
22 talking about now, I hope that, to the extent that the FBI's  
23 practices are inconsistent with the expectations of the  
24 government lawyers who are working with them, that as a  
25 practical matter that's an issue that will be worked on to

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1 smooth out any differences in terms of protocol and to ensure  
2 that the writings presented to the court are consistent with a  
3 common understanding. If this is an issue that need not be  
4 litigated in other cases, I would hope that the government is  
5 taking appropriate steps, apart from the consequences in this  
6 case, to ensure that this type of gap does not reappear.

7 So that's separate and apart from this case. So I  
8 label it as dicta.

9 MR. BELL: We do appreciate that, your Honor.

10 With that understanding in place, with the  
11 representations that we have made accordingly, I would  
12 reiterate Ms. Lonergan's point that going forward we feel that  
13 the appropriate sort of two-track solution to this would be I  
14 think as your Honor described it, which is for us to, now  
15 mindful of what has happened and fully aware of what has  
16 happened, respond to defense queries in the most comprehensive  
17 and fulsome way that we are able to and then to respond to a  
18 motion when it comes.

19 We appreciate that this isn't a problem that the  
20 defense is making, and we appreciate now that this was a -- we  
21 also appreciate that this was something that we were not in the  
22 best position to respond to ourselves because we didn't quite  
23 appreciate what was going on from within the jar, as it were.

24 But going forward, and now with the full universe out  
25 there, and aware of what it is that has led us to this point,



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1 we feel that we are in a position to adopt a procedure along  
2 the line of what was discussed earlier, but we do take your  
3 Honor's point.

4 THE COURT: I appreciate that.

5 I expect a letter by Tuesday regarding the audit  
6 issue.

7 Ms. Necheles raised a second question with respect to  
8 which she sought a response from the government.

9 United States, can you respond to that?

10 MS. LONERGAN: Yes, your Honor. Our response is that  
11 we provided the information that we have already provided with  
12 respect to our conversations with Verizon Wireless. Again, we  
13 don't think that us speaking on behalf of Verizon Wireless in  
14 this sort of informal nonhearing setting is really going to  
15 assist in any kind of fact-finding. It's a game of -- I don't  
16 mean to make a pun, but it's a game of telephone, where we get  
17 defense counsel's questions, we pose them to Verizon, Verizon  
18 provides us with answers, we then provide them to the court and  
19 we have additional questions. That doesn't seem to be either  
20 efficient or a real way to get at the truth here.

21 THE COURT: Thank you.

22 Are you willing to consider a call with defense  
23 counsel on the line to discuss these issues in realtime with a  
24 Verizon representative?

25 MS. LONERGAN: I think it would be helpful. My

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1 understanding from having spoken to Verizon before is that they  
2 will do what they can in the moment. It might be something  
3 where there are particular questions that it would be helpful  
4 for everyone to pose them to the Verizon individuals in  
5 advance, see if they can investigate, get answers, and then we  
6 could do something along the lines that the court has  
7 discussed.

8 But again, I don't think it's necessarily productive  
9 to call them, say, here are the eight questions we have, and  
10 expect them to be able to answer them in that moment.

11 THE COURT: That sounds like a productive suggestion.

12 So, government, I expect to see your letter by  
13 Tuesday.

14 I am going to ask that the parties confer regarding  
15 the suggestion just made by Ms. Lonergan about how to put  
16 questions to Verizon that the defense has regarding the process  
17 that the government has described. I think that laying the  
18 groundwork with some written questions might be a fruitful way  
19 to facilitate a substantive communication with Verizon if the  
20 government is willing to host a call to give the defense an  
21 opportunity to ask questions informally of the representative.

22 My hope in suggesting that protocol is that the  
23 defense will be able to hear live the Verizon representative's  
24 responses and will be able to make a decision regarding whether  
25 or not additional formal steps are required in order to

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1 scrutinize those assertions.

2 So what I would like to do -- yes.

3 MS. NECHELES: Can I just address that?

4 THE COURT: Please do.

5 MS. NECHELES: I just want to know what happened here.  
6 I can't really write out questions. I thought that the  
7 government was going to come back with further answers. That's  
8 what they promised us last time. We did have further questions  
9 that we gave the government.

10 I could have Verizon on the phone and have my expert  
11 with me and then start asking questions. The next question  
12 will depend on what their answer to anything is. I need  
13 somebody who knows what happened here, not just theoretical,  
14 which is what we got last time -- it could be this or could be  
15 that. I need somebody from Verizon. I don't need to do it in  
16 a hearing in front of your Honor. I understand that. There  
17 might be a more efficient way to do it. But I can't get it all  
18 written out beforehand, because my expert said I don't know how  
19 this could have happened. So I need to hear from Verizon and  
20 then my expert be able to ask further questions of that person.

21 THE COURT: Thank you.

22 Let me just add, I don't understand Ms. Lonergan's  
23 proposal to necessarily be in the format of interrogatories  
24 necessarily or only specific written questions. But perhaps  
25 enough in the way of --

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1 MS. NECHELES: I just want to know what happened. Can  
2 we speak to someone who knows what happened on this wire. And  
3 if she puts someone on the phone, I can sit there with my  
4 expert and ask them questions about what happened, how did this  
5 happen that these calls didn't go through. My expert will be  
6 able to say that makes sense or no, that doesn't make sense. I  
7 don't have the technical expertise at all to be able to  
8 evaluate or to write up questions.

9 I think probably the government has never seen this  
10 before. Everyone I speak to says how is it possible that this  
11 happened.

12 THE COURT: It might be a brief description of the  
13 specific incidents of interest and a number of general  
14 questions regarding the specific instances might be a useful  
15 way for the Verizon representative to prepare for what would  
16 then be a more open-ended call. I am not going to dictate the  
17 correct protocol. I appreciate the government's willingness to  
18 approach Verizon to host such a call.

19 What I will do is ask the government to provide me  
20 with a letter regarding the audit question by Tuesday. I would  
21 like to have the parties, and direct the parties, to meet and  
22 confer regarding these issues on a date certain. I would like  
23 to ask when you think would be a fruitful time to do that,  
24 counsel, because I am going to direct that you do meet and  
25 confer to discuss these issues sometime in the near future.

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1 That can be next week, it could be sometime other than next  
2 week, but I would like to get a specific date so I can direct  
3 you to do that.

4 MS. NECHELES: Your Honor, we had also written to the  
5 government and asked, because we believe there is other  
6 documentation about this wire that they have not produced to  
7 us, such as sealing orders. We asked them to check. We see  
8 that there are sealing orders we have not received. I don't  
9 think we have received any of the orders with respect to the  
10 GPS. So we have asked them to provide whatever they don't have  
11 or haven't given to us, to go back and check to see what they  
12 haven't given to us and give it to us.

13 I haven't heard a date back. I think if we could get  
14 that date of when they would be producing those things and  
15 after that we could have whatever meet and confer.

16 THE COURT: Thank you.

17 United States.

18 MS. LONERGAN: Your Honor, just to be clear, this  
19 request came from defense counsel late yesterday afternoon.  
20 And we responded saying, we will get them to you. Again, I  
21 just want to make sure the court has the full picture, that we  
22 are rapidly responding to the defense requests. We cannot  
23 respond them the second they come in. It's not possible.

24 THE COURT: That's fine.

25 MS. LONERGAN: We are happy to do a meet and confer

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1 again.

2 THE COURT: Can I ask before we come to that, can you  
3 provide an estimate regarding the time by which the United  
4 States will provide the sealing orders and orders associated  
5 with the GPS information that was produced at the time of the  
6 last conference?

7 MS. LONERGAN: Your Honor, with respect to the sealing  
8 orders, I hope later today or early next week.

9 With respect to the GPS orders, we need to look into  
10 it more. The wiretap orders themselves also provide for GPS  
11 and they already have the wiretap applications. To the extent  
12 there are additional GPS and they haven't been provided with  
13 that paperwork, I'm not aware of that, but we will look into it  
14 and turn that around as quickly as possible.

15 Again, your Honor, I understand defense counsel's  
16 general position that it's not possible to anticipate every  
17 question in advance. Of course that makes complete sense.  
18 Nevertheless, for this meet-and-confer session to be fruitful,  
19 we don't want to be in a position -- I understand it's  
20 frustrating for everyone -- for defense counsel to raise  
21 questions and we say we don't know, we have to go back and  
22 confer with the FBI.

23 We would just request, to the extent we are trying to  
24 make this productive, to the extent they can even provide us  
25 with a list of topics or a list of concerns in advance, then we

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1 will do our due diligence to attempt to have answers. Does  
2 that mean they can't ask additional follow-up questions. Of  
3 course not. But again, we think that will make all of this the  
4 most efficient and most fruitful possible.

5 THE COURT: That sounds like a very reasonable  
6 proposal and I appreciate the government's willingness to  
7 approach it in that way.

8 When would be an appropriate time given all of that  
9 for the parties to discuss any remaining discovery issues?

10 I would like to set a date for a meet and confer and  
11 then I would like to set a date for the parties to send me a  
12 letter just to let me know where you are with respect to the  
13 issues or to request a hearing or conference, I should say, to  
14 the extent one is necessary. To the extent that the defense is  
15 anticipating the prospect of a motion, you could also alert me  
16 to that fact in the letter that I am thinking of.

17 So first, when would you propose to have the meet and  
18 confer? And then I will set a date for another status update  
19 letter based on that.

20 Counsel for United States.

21 MS. LONERGAN: Your Honor, our request would be 48  
22 hours after defense counsel sends us our general list of  
23 topics. That will give us hopefully enough time -- we are  
24 prepared to do this as soon as possible but, again, we just  
25 need a little bit of time to get answers to the questions that

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1 they may have.

2 THE COURT: Thank you.

3 That should happen also sometime after the government  
4 has completed its production of the sealing orders and  
5 completed its assessment of whether or not there are additional  
6 GPS orders as well as respond to the audit question.

7 Sometime after Wednesday.

8 MS. LONERGAN: If I can make a proposal that defense  
9 counsel get us our list of topics and general questions  
10 sometime next week and then we can do the meet and confer the  
11 following week.

12 THE COURT: Thank you.

13 Counsel for defense.

14 MS. NECHELES: I think we told the government  
15 everything we want. What happens is we keep having new  
16 questions because we keep discovering that things haven't been  
17 turned over. All of these sealing orders, they are required by  
18 law to turn this over to us as soon as the case starts. So for  
19 me to now be discovering that they haven't turned it over --  
20 when the government says we are doing it as quickly as  
21 possible, I am sort of like stunned by that statement because I  
22 shouldn't have to go through now and put everything in writing,  
23 let me look, did they turn this over, and try to pick out what  
24 it is they didn't turn over.

25 I am asking them to go back through all of their stuff



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1 and figure out what they haven't turned over. Otherwise we are  
2 going to keep doing this. It's just not right. We rely on  
3 them following the law. It is not right for them to keep  
4 standing up and saying, well, the defense didn't tell us about  
5 this. I am not surprising anybody. I am just saying I have  
6 discovered you didn't follow the law again and again and again.

7 So I don't buy this statement we are doing it as  
8 quickly, we are trying to get everything to the defense. No.  
9 They didn't do this quickly. They didn't go back and check  
10 when we asked them to go check. So I don't really even know  
11 what I am going to be giving them. I will go back and try to  
12 figure out what we have not gotten yet, what we think we  
13 haven't gotten. I am asking them to go back and check, did we  
14 give everything we were required to give by the law here?

15 MR. BELL: I'm sorry. Is this about Verizon?

16 THE COURT: No. I think that was a broader comment.  
17 I think Ms. Lonergan was just referring to specific questions  
18 for Verizon.

19 MS. NECHELES: My basic question for Verizon is, how  
20 come you didn't make these calls. They know as well as we do  
21 which calls weren't there. They are on the phone. I have  
22 charted some of it up. They can make the same chart I made.  
23 They have the phone records. They have the logs. They know  
24 what calls were not made. They said they were the ones in  
25 California. I think that's true. I think they most likely are

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1 the ones the California that we have gone back and checked that  
2 now. I think that there are random calls missing elsewhere,  
3 but it doesn't seem to be a pattern and they seem to be short  
4 calls. So I think it is true.

5 So the question is, who can we speak to at Verizon who  
6 can start to explain this. I don't know what questions I would  
7 have that they can't see themselves from those records. There  
8 are calls there. They are not being picked up. Why is that?

9 THE COURT: Understood.

10 I think it might be helpful, given the work that you  
11 have already done, to provide a short letter or writing  
12 describing the issues that you have identified and why it is  
13 that you or the kinds of issues that you would like to begin a  
14 discussion about. I think that's what the United States is  
15 suggesting would be helpful in order to frame the conversation  
16 with Verizon. I think that that is a reasonable request. So I  
17 would like to ask you to consider doing that, please, counsel  
18 for defendant, just to focus the conversation with Verizon as  
19 much as possible.

20 When do the parties believe that you can get together  
21 to meet and confer on any remaining discovery issues, including  
22 the topic of conversations with Verizon? The United States has  
23 just proposed the week after next.

24 Ms. Necheles, Mr. Meringolo, what is your view?

25 MR. MERINGOLO: That's fine, your Honor.

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1 THE COURT: Thank you.

2 Is the 29th a reasonable date for the parties?

3 MS. NECHELES: Yes. The 29th or the 30th is fine.

4 MR. MERINGOLO: Yes, your Honor.

5 THE COURT: Parties, I am going to direct you to meet  
6 and confer in person regarding any outstanding issues on May  
7 29th. My hope is that that will be a very productive meeting  
8 and that's going to in some ways require putting some of the  
9 past in the past and working collaboratively to try to resolve  
10 the issues that currently confront the parties. So I hope that  
11 the parties will meet and confer, discuss these issues  
12 collaboratively on the 29th.

13 To the extent there are other issues you would like to  
14 bring to my attention regarding those discovery issues, I am  
15 going to ask that you send me a joint letter no later than the  
16 end of that week, if you can do that, which is Friday, June  
17 1st.

18 If you're making good progress, as I hope you will be,  
19 I hope you will just let me know that. If there are any issues  
20 with respect to which the parties need court intervention,  
21 please identify those as well and I will schedule a conference  
22 for us to come together. My hope is that will give us a clear  
23 frame for resolving these issues.

24 Counsel for the United States, I take it that with the  
25 exception of the things that we have discussed here that there

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1 are no additional discovery-related documents that this  
2 prosecution team currently knows of or has that have not been  
3 turned over to the defense. Is that fair?

4 MS. LONERGAN: One moment, your Honor.

5 THE COURT: Thank you.

6 MS. LONERGAN: Your Honor, we have been scouring our  
7 files, as Ms. Necheles suggested we do. We have been engaged  
8 in that to determine if there is anything that should have or  
9 should be produced that has not been. To the extent that we  
10 identify anything, our goal is to produce all of that next  
11 week.

12 THE COURT: So the parties will have all of that  
13 information, to the extent there is any at this point, in time  
14 for your meet and confer.

15 I appreciate that, United States.

16 So I would like to talk about a few issues that don't  
17 relate to the documents. I don't think I am going to take up  
18 every issue on my agenda. I would like to talk about a few  
19 issues, however, first.

20 MR. BELL: Your Honor, may I ask you a personal  
21 indulgence? In 15 minutes or so I will need to ask to be  
22 excused for the same medical appointment that I was going to  
23 seek to be excused during trial.

24 I have amongst our team particular responsibility for  
25 the Touhy issue. So I wonder if there is any way we can

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1 address that first.

2 THE COURT: I will be happy to take that up now.

3 I have reviewed the parties' submissions with respect  
4 to the Touhy issue. I am prepared to rule on that issue unless  
5 the parties have additional arguments that you would like to  
6 present.

7 Counsel, first for the United States. Let me hear  
8 from you.

9 MR. BELL: Your Honor, I think that we are largely  
10 content to rest on our submissions. We sent a followup to Mr.  
11 Meringolo's response regarding Sergeant Klausner, and I think  
12 we sent that in actually the morning of our last conference.  
13 So I want to make sure that that didn't get lost in the fray.

14 The major point that we wanted to underscore in that  
15 submission was that even setting aside the employee prong,  
16 which we feel covers Sergeant Klausner both from his  
17 deputization forward, and frankly all the time that he was  
18 supervised by the FBI, there is also a subject matter concern  
19 here that's covered by another one of the Touhy prongs.

20 This is an FBI investigation. This is investigative  
21 material that belongs to the FBI. The same concerns that  
22 clearly motivate the entire statutory regime are in place  
23 regardless of what Mr. Klausner's particular status was at the  
24 time. It's not meant to throw up a roadblock. We would hope  
25 that Mr. Meringolo could get a proper list of questions -- not

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1 questions but subject matter areas to the appropriate  
2 representative at the FBI's counsel, and that they would be  
3 able to relatively expeditiously filter back a position.

4 We expect that to the extent that the avenues of  
5 inquiry are proper in the first place, there would not be an  
6 issue.

7 THE COURT: Let me ask about the scope issue because I  
8 think that in addition to the employee issue, that is something  
9 to focus on.

10 Mr. Meringolo's application notes that there is a  
11 specific scope limitation regarding Sergeant Klausner's  
12 deputization with respect to his work on the task force which  
13 is relatively limited. It's to monitor Title III intercepts  
14 and to seek and execute arrest and search warrants.

15 Why is anything else, other than things within those  
16 two scopes, within those two topic headings, I should say,  
17 within the scope of his work?

18 MR. BELL: Because Mr. Klausner, just as a matter of  
19 fact, was supervised by the FBI vastly more than that.  
20 Regardless of what the scope of his deputization on paper was,  
21 Mr. Klausner was an active member of the investigative team in  
22 the same way as the other members who actually did work with  
23 the FBI.

24 THE COURT: Let me just comment on that or to focus  
25 the argument.

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1           There are a number of police officers who too were  
2           working jointly on the investigation. So they are not subject  
3           to the Touhy regs.

4           MR. BELL: I'm sorry. I want to hear you again on  
5           that, but I don't think that's accurate.

6           THE COURT: I have heard multiple times that this is a  
7           joint investigation by the Internal Affairs Office at the NYPD  
8           as well as by the FBI. Is that not correct?

9           MR. BELL: It is correct, your Honor, but to a very  
10          limited degree. To be clear -- I think this has gotten  
11          obscured somewhat in all of the rhetoric and argument  
12          concerning disclosure of certain materials in the possession of  
13          the NYPD. So the government wishes to be clear here.

14          To the extent that the NYPD was involved as an initial  
15          matter, it was only the Internal Affairs Bureau. It was  
16          primarily Sergeant Klausner. And it was Sergeant Klausner's  
17          involvement as essentially a member of the investigative team  
18          in the function that an FBI person holds here.

19          THE COURT: Sergeant Klausner is a member of the  
20          Internal Affairs Bureau?

21          MR. BELL: That is correct, your Honor.

22          THE COURT: Thank you.

23          MR. BELL: There was no participation beyond the  
24          Internal Affairs Bureau. And within the Internal Affairs  
25          Bureau's participation in this investigation, Sergeant Klausner

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1 was effectively like the case agent who happened to also be  
2 NYPD.

3 We have received additional assistance from really one  
4 named person that I can -- maybe two that I can call to mind,  
5 but none of those people were -- Sergeant Klausner was  
6 essentially it.

7 So part of the concern I think that we have and part  
8 of the concern that candidly I think the folks at the FBI  
9 counsel have about this is what factual involvement Sergeant  
10 Klausner has that would prompt an admissible line of inquiry in  
11 the first instance. Given that, he has essentially just the  
12 case agent here.

13 But setting that aside, there has been all of this  
14 talk about there being a joint investigation in the way that  
15 suggested that the NYPD and that the FBI were equal partners in  
16 this. That's just not in any functional way accurate.

17 Sergeant Klausner was effectively deputized in  
18 function and then deputized on paper with the document that  
19 your Honor has seen from 2017. But he worked under the  
20 supervision of the squad leader at the FBI who supervised the  
21 rest of the investigative team.

22 THE COURT: Why should I ignore the scope limitation  
23 in the deputization order? If that was the case and there is a  
24 desire to deputize him to act in a broader way, why not put  
25 that into the deputization order?



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1           MR. BELL: For starters, your Honor, Sergeant Klausner  
2 wasn't deputized until 2017. The bulk of what I think he would  
3 have to say about the investigation, particularly given when  
4 this case was charged, in 2016, doesn't revolve around the  
5 scope of a deputization order that had not yet materialized  
6 but, rather, what it was that Sergeant Klausner was actually  
7 doing.

8           THE COURT: Why does that help your argument? To the  
9 extent that the actions happened prior to the deputization  
10 order, is there any argument that he was employed by the FBI  
11 within that period?

12           MR. BELL: Yes, your Honor. And that argument comes  
13 from an analysis of what the term employee actually means  
14 within the scope of the Touhy regulations themselves. This is  
15 what we wrote about in our letter before last on this topic.

16           That's not a definition that hinges on any formal  
17 deputization or any other particular process. It's a matter of  
18 what he does. It's a matter of the subject matter with which  
19 he works. So we would respectfully submit, your Honor, that  
20 the employee characterization fits and would have fit had  
21 Sergeant Klausner never received a formal deputization, because  
22 the definition of employee within the Touhy regulations  
23 themselves covers him. And beyond that there is the additional  
24 layer of the subject matter and this being the FBI's  
25 investigation, which we mentioned in part in our most recent

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1 correspondence with the court.

2 THE COURT: Thank you. I will comment on that.

3 Any additional argument from the defense on this?

4 MS. CAPPELLINO: Yes, your Honor. Very briefly.

5 Just to be clear, we would not seek to elicit any  
6 testimony from Sergeant Klausner that went beyond the  
7 investigation as it pertained to Mr. Grant. Mr. Grant was  
8 indicted in July 2016. The investigation was about from 2014  
9 through 2016. Our questioning would have to do with Sergeant  
10 Klausner's position in the Internal Affairs Bureau. To the  
11 extent the government argues that he is I think a de facto  
12 employee outside of the scope of the deputization, that was on  
13 July 31, 2017.

14 Again, your Honor, as you stated on record, the  
15 document, one-page document, it very narrowly defines the scope  
16 of Sergeant Klausner to Title III wiretap. Again, we would  
17 very respectfully elicit testimony only having to do with his  
18 position as an Internal Affairs Bureau employee. At that time  
19 he was squarely acting in his capacity as an NYPD member at  
20 that time, as well, as if you just look at the scope, the time  
21 frame, this would be from 2014 up until 2016. So that's why we  
22 believe he would not fall under the Touhy regulations,  
23 respectfully.

24 MR. BELL: If that's the case, then what is required  
25 here, I would think, in order for your Honor to make a

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1 determination is some level of fact-finding as to what Sergeant  
2 Klausner's supervision actually was prior to the point of his  
3 actual deputization.

4 THE COURT: Can I just flag something for you? I am  
5 going to deny the government's motion and I will give you the  
6 full analysis, but I will just respond in part before I come to  
7 it in order to the argument that you are about to make.

8 Section 16.21, which is the genesis for this line of  
9 argumentation, applies to "all officers and employees of the  
10 United States ... subject to control of the Attorney General."

11 That provision of the regulation on which this  
12 argument rests does not say all persons subject to his control.  
13 So as I am about to conclude, the language that the government  
14 points to modifies which employees are subject to the  
15 regulations. It does not define who is an employee.

16 So let me just provide you with a short overview of my  
17 decision with respect to this issue. In large part I agree  
18 with the defense's arguments here.

19 On May 7, 2018, the United States wrote the court,  
20 asking that I direct the defendants to comply with the Touhy  
21 regulations in compliance with the subpoena issued to Sergeant  
22 Klausner of the NYPD. The government took the position that  
23 his testimony was subject to the Touhy regulations for, at  
24 first, unstated reasons.

25 After I provided them with the opportunity to bolster

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1 their arguments regarding the applicability of the Touhy  
2 regulations to Sergeant Klausner, the government wrote on May 8  
3 to explain why the Department believes that he is an "employee"  
4 for purposes of the regulation. They provided no further  
5 explanation for their position that the Touhy regulations apply  
6 in this situation.

7           The United States argues that Sergeant Klausner became  
8 an "employee" of the Department of Justice under the relevant  
9 regulations by virtue of his July 31, 2017 special deputization  
10 as a Special Deputy U.S. Marshal. The special designation  
11 describes the limited scope of his deputization as follows:  
12 "To monitor Title III intercepts; to seek and execute arrest  
13 and search warrants."

14           Pursuant to the deputization, the sergeant agrees to  
15 "faithfully execute all lawful orders issued under the  
16 authority of the United States, directed to the United States  
17 Marshal, the United States Marshal Service, or to an  
18 appropriate federal officer."

19           I cannot find that the Touhy regulations restrict the  
20 proposed testimony by Sergeant Klausner.

21           First, even assuming that Sergeant Klausner was an  
22 employee of the Marshals' Service after the date of his  
23 deputization, there is no basis for me to conclude that the  
24 Touhy regulations restrict testimony regarding information that  
25 he obtained prior to his deputization.

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1           Here is what the Touhy regulations state about their  
2 scope: "This subpart sets forth procedures to be followed with  
3 respect to the production or disclosure of ... any information  
4 acquired by any person while such person was an employee of the  
5 Department as a part of the performance of that person's  
6 official duties or because of that person's official status."  
7 28 C.F.R. 16.21 (emphasis added).

8           Any information that Sergeant Klausner obtained prior  
9 to his deputization in 2017 cannot have been acquired by him  
10 while he was an employee of the United States Department of  
11 Justice or as a result of his official status. The United  
12 States points to no law that supports the position that any  
13 person, once employed by the DOJ, may not testify about any  
14 matter that they learned of prior to their employment.

15           Moreover, the Touhy regulations only protect  
16 information obtained by Department employees "as part of the  
17 performance of that person's official duties or because of that  
18 person's official status."

19           The only things that Sergeant Klausner has been  
20 authorized to do pursuant his deputization is to review  
21 wiretaps and seek and execute arrest and search warrants. No  
22 arguments before today have been presented by the United States  
23 regarding how efforts taken outside of the scope of his  
24 deputization -- in other words, anything other than Title III  
25 wiretaps and search and arrest warrants pursuant his

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1 deputization -- could be subject to the Touhy regulations.  
2 Perhaps there is a specific order made to him pursuant to the  
3 deputization that could be covered within its scope, referring  
4 to the original element of the scope that required him to  
5 comply with orders, but if so, I am unaware of it.

6 To the extent that the testimony relates to other  
7 matters, it was not part of his official duties or because of  
8 his official status. Clearly then, testimony regarding  
9 anything that he did prior to his deputization is not protected  
10 by the Touhy regulations. Based on the information available  
11 to me now, I believe that the best position is that anything he  
12 did outside of the scope of his limited deputization after its  
13 entry is not protected either.

14 These conclusions dispose of the issue. But I want to  
15 comment on the United States' arguments regarding whether or  
16 not Sergeant Klausner is the Department's employee. I am  
17 referring now to the arguments in the written submissions to  
18 the court.

19 I will address the argument raised here at the end.

20 Their argument rests exclusively on the definition of  
21 "employee" in 28 C.F.R. 16.21, which reads: "For purposes of  
22 this subpart, the term employee of the Department includes all  
23 officers and employees of the United States appointed by, or  
24 subject to the supervision, jurisdiction, or control of the  
25 Attorney General of the United States, including U.S.

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1 Attorneys, U.S. Marshals, U.S. Trustees and members of the  
2 staffs of those officials."

3 The United States emphasizes the words "or subject to  
4 the supervision, jurisdiction, or control of the Attorney  
5 General of the United States" to argue that because Sergeant  
6 Klausner has agreed to obey lawful orders issued under the  
7 authority of the United States, he is an employee of the  
8 Department of Justice.

9 First, as I just did, I want to note that Section  
10 16.21 applies to "all officers and employees of the United  
11 States ... subject to control of the Attorney General," not all  
12 persons subject to his control. So the language that the  
13 government points to modifies which employees are subject to  
14 the regulations, it does not define who is an employee.

15 Second, as Mr. Grant points out, the deputization  
16 specifically states that the sergeant is not an employee. It  
17 states: "This appointment does not constitute employment by  
18 the ... United States Department of Justice or United States  
19 government." In the face of this text, and lacking any other  
20 basis to conclude that the sergeant should, nonetheless, be  
21 treated as an employee of the Department of Justice for  
22 purposes of the Touhy regulations, I conclude that the United  
23 States has failed to support the conclusion that he is an  
24 employee of the United States Department of Justice. The  
25 defense need not comply with the Touhy regulations in order to

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1 obtain his testimony.

2 I want to comment briefly on the argument raised here  
3 that some fact-finding may be appropriate to determine whether  
4 or not he was employed prior to his deputation. That was not  
5 an argument presented previously. I don't know what the basis  
6 would be for that and I don't know what the standard would be  
7 that would apply to determine whether or not he was an employee  
8 of the government; if it's the common law test with respect to  
9 whether or not someone an employee or otherwise.

10 I wonder if the government has considered what the  
11 consequences would be if all persons working in conjunction  
12 with the FBI are federal government employees under some  
13 amorphous standard not driven by the Touhy regulations  
14 themselves.

15 So based on the information that was presented to me  
16 in connection with the letters, I am not persuaded by the  
17 government's position. To the extent this is an issue that  
18 they want to address by deputizing people earlier and expanding  
19 the scope of their deputation in order to enhance their  
20 argument in the future, that is something they might do.

21 Before Mr. Bell leaves -- do you have to leave now?

22 MR. BELL: Yes.

23 THE COURT: Please go.

24 MR. BELL: Thank you, your Honor.

25 One final point before I leave, I guess, on this.



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1 THE COURT: Please.

2 MR. BELL: Given what the statutes say about the  
3 purpose of the Touhy regulations and the concerns that animate  
4 them, I recognize your Honor's ruling and of course the  
5 government respects that ruling. I would nevertheless ask that  
6 once the time comes, should defendant Grant wish to call  
7 Sergeant Klausner that there be some sort of attorney proffer  
8 required prior to that testimony so as to ascertain what it is  
9 that he seeks to elicit to make sure that it's actually  
10 admissible.

11 There is a sensitivity codified within the regulations  
12 as to whether individuals who work under the supervision of the  
13 folks that Sergeant Klausner worked under can elicit these  
14 sorts of things. I recognize that they are not being required  
15 to go through Touhy, but we also struggle on some level to find  
16 a basis on which Klausner is viable witness in any event. We  
17 would ask an attorney proffer be required prior to his  
18 testimony so that we can filter things out on another basis if  
19 one is appropriate.

20 THE COURT: Thank you. I appreciate that. We will  
21 discuss that. Please hold that place.

22 I think I have already made comments about an  
23 assertion in one of the Grant motions suggesting that there  
24 would be an attack on this investigation as a whole. To the  
25 extent that that's the purpose of this, I think I have already

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1 articulated some concerns about the propriety of such testimony  
2 under Rule 403.

3 MR. BELL: We appreciate that. Thank you.

4 THE COURT: Thank you. Good luck.

5 I would like to focus this, because I don't want to do  
6 too much work without the benefit of Mr. Bell, I don't want to  
7 deprive him of the opportunity to be here.

8 The only two issues that I think I need to talk about  
9 with you all now are the issues of defense exhibits and my  
10 proposal regarding the questionnaire. I propose to take up  
11 those topics alone and then to table the one other issue that  
12 I -- two other issues which I think we have, which are my  
13 assessment of the arguments regarding the subpoena for the  
14 accounting records, which is in some ways not necessary at this  
15 time, and then also my oral decision regarding the Cox and  
16 Prostitute-1 issues. I have already given you the bottom line  
17 for the latter.

18 Is that reasonable counsel? I would like to focus on  
19 what we need to do to prepare for trial.

20 MS. RAVENER: Certainly, your Honor.

21 THE COURT: Is that acceptable to you, Ms. Necheles,  
22 and, Mr. Meringolo?

23 MS. NECHELES: Yes.

24 MR. MERINGOLO: Yes, your Honor.

25 THE COURT: With respect to the exhibits, there is one

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1 benefit of the fact that we have been required to push back the  
2 trial, which is that I think that we could put in place a more,  
3 I will call it reasonable approach regarding defense exhibits.  
4 This is the subject of some litigation.

5 I don't think that there is a question regarding my  
6 authority to ask the defense to provide exhibits that it  
7 intends to introduce as substantive evidence as part of its  
8 case in chief, whether that's during cross-examination of the  
9 government's witnesses or otherwise. Mr. Meringolo described a  
10 reasonable protocol used in his case with Judge Sullivan. The  
11 problem we were presented with previously was because no  
12 request had been made to me to build that into the schedule and  
13 I did not think to do it independently, I had not set a  
14 deadline for the defense to do that that would be workable  
15 given our prior trial date.

16 Now the trial date is a long time away. As a result  
17 of the way in which these issues have erupted, the defense has  
18 many months of time with the government's exhibits and 3500  
19 materials between now the date of trial. So I would like to  
20 set a deadline for the defense to provide the exhibits that it  
21 intends to introduce as substantive evidence as part of its  
22 case in chief and would like to request proposals for that  
23 deadline now. I think that will very much streamline our  
24 process as we approach trial.

25 Counsel for defendant, what is your proposal?

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1           Mr. Meringolo, you described a time period before  
2 trial that you used in the case across the street. What is the  
3 defense's first suggestion regarding this?

4           MS. NECHELES: Your Honor, if I could just back up and  
5 tell your Honor a little bit of the problems and talk this  
6 through with your Honor, because I understand what your concern  
7 is. I am handing up some notes, some 3500 material, that was  
8 given to us by the government so that I could sort of discuss  
9 what my problem is.

10           So as your Honor is aware, in a criminal case like  
11 this we don't a deposition of any witness and we don't really  
12 know what the witness will say. We have 3500 material from the  
13 witnesses. But the main witness is Jona Rechnitz. And there  
14 has not been an FBI-302, which is a typewritten report, that  
15 has been created for Mr. Rechnitz since 2017. I think it  
16 was -- there is one in October 2017. But even before then they  
17 become very sparse.

18           Instead what we have been given as the 3500 material  
19 are notes like what I passed up to your Honor. And we have a  
20 lot of notes like that. But you can't really tell from these  
21 notes what his testimony will be. In fact, as trial prep gets  
22 closer, the notes get sparser and sparser. There is very  
23 little in the notes.

24           We all understand that that is done deliberately by  
25 the government. The government has always done this. They do

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1 it in all cases and they are allowed to do this. They do not  
2 take good notes as it gets closer to trial. I am not saying  
3 they are doing anything wrong, but that is purposeful. They do  
4 not want to outline the direct examination for the defense to  
5 have it and we don't know what the direct examination will be.

6 In addition, in this case, we do not know what the  
7 acts are, the bribery acts, what the specific bribes will be or  
8 what the benefits given or the official acts for the  
9 actual -- that are not done by the co-conspirators, but  
10 supposedly were done by Grant or Harrington. The government  
11 has never given us a bill of particulars for that. There are a  
12 few official acts listed in the bill of particulars -- in the  
13 indictment. But the government is free to put in anything and  
14 we don't know. We are guessing. And I think we will be  
15 surprised at trial of things they claim. Every time we sort of  
16 see new things that appear to be acts and we are sort of the  
17 scrambling, and we are very much scrambling before the date and  
18 think we will be scrambling again as things go along.

19 So given that it is hard for us, very hard for us to  
20 say what will be in the -- what exhibits we will be putting in  
21 evidence.

22 In addition, with respect to the exhibit list, we do  
23 not have an exhibit list from the government. I know that the  
24 government has said they gave it to us, but we had a whole  
25 discussion before about we do not have a list of exhibits of

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1 what they intend to introduce in evidence from any of the  
2 seized devices. So we have what they intend to introduce with  
3 respect to telephone calls or wiretapped calls. But with  
4 respect to the seized exhibits, they had marked every document  
5 or every item that was recovered or was pursuant to a search  
6 warrant from the seized devices as an exhibit.

7 That cannot go in evidence, all of those items,  
8 because they are not all relevant, they are not all admissible.  
9 You can't just sort of dump tens of thousands of documents or  
10 data into evidence without a question as to its admissibility.

11 So I assume what the government is doing is  
12 identifying those, and then there will be other items that they  
13 actually intend to introduce in evidence.

14 Shortly right before the previous trial date, they  
15 gave us a list finally of some of the items from the seized  
16 devices which they said they intended to introduce in evidence.  
17 We wrote back saying we can't find these items. There are no  
18 Bates stamp numbers. Please identify them. Please give us a  
19 copy of them so we can figure out what you're talking about.  
20 We did not hear back from the government on that.

21 There will be big issues with respect to some of them  
22 because some of them appear to be chats which, as we discussed  
23 before, the way a chat is labeled it can be years long. I  
24 don't know what it is that the government is saying they want  
25 to put into evidence with respect to these.

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1           So that makes it difficult, again, for us to determine  
2           what it is that the government is actually alleging, what it is  
3           that they intend to produce, and makes it extremely difficult  
4           for us to be able to respond.

5           So that's just a logistic problem that I wanted to  
6           outline, what our logistic problems are with respect to this.

7           Now, what we are able to do and will be able to do and  
8           we will be able to sort of work on now is figuring out exactly  
9           what transcripts, what wiretap conversations we may be using  
10          and seeking to play at trial and getting the government a good  
11          tape, a good transcript of those, which I think is probably the  
12          logistically most difficult aspect for the government if we  
13          were to give those to them at the last minute.

14          So we had started working on those and are going to  
15          turn our attention back to working on those and hope to be able  
16          to have a stipulation with the government that both sides have  
17          stipulated to, now that we have time, we will be able to both  
18          sides stipulate to the accuracy of each side's transcripts and  
19          we will be able to give those transcripts to the government.  
20          To the extent they think any of them should not be played at  
21          trial, they will be able to make whatever motions there are  
22          with respect to those.

23          Now, with respect to other documents, there are  
24          documents that we have obtained from third sources that we may  
25          seek to put into evidence. But, frankly, here is what our

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1 problem is, and I am concerned about it.

2           Some of what we will be doing is seeking to show at  
3 trial that the main witness for the government -- it is one  
4 witness, your Honor, and it is critical for us to be able to  
5 show the jury that he is a liar, that he has made up a story  
6 here, and that he seeks to blame our clients, the defendants  
7 here, for things maybe that he has done wrong, or just to make  
8 up stories. So we will be seeking to show the jury that he has  
9 made up a story.

10           My fear is, and it's always a defense fear, is if I  
11 give documents to the government which shows that he is a liar,  
12 he will not testify about those things at trial. So that will  
13 make our job showing the jury how he has lied much more  
14 difficult and how he has blamed the defendant. And it will  
15 make the trial longer. Because what we will have to do is we  
16 will have to elicit, you changed your story, right? You had  
17 previously said X and now you're saying Y. And he may deny. I  
18 don't remember that I said X.

19           This witness, I have watched him testify and I have  
20 never seen a better prepped witness. He has spent hundreds and  
21 hundreds of hours with the attorneys, with the government. He  
22 is a very prepped witness and totally understands if I say that  
23 document doesn't refresh my recollection, that could put a end  
24 to a cross.

25           He may say, and I saw him do this before, I don't



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1 remember saying that before. Then we will have to call another  
2 witness to say, yes, one of the agents who took his notes to  
3 say yes, this witness said X before. And then we will have to  
4 show we gave a document to the government on Y date which made  
5 him change his story. So we will have to call another witness  
6 because this witness won't know that we gave a document on what  
7 date to the government, as opposed to be able to just confront  
8 him with it and show to the jury that he is lying.

9 So that really is our problem on some of this stuff,  
10 that traditionally those kind of materials the government is  
11 the entitled to. Traditionally what the courts have done is  
12 allowed cross-examination to take place without requiring that  
13 documents be given before the witness's testimony.

14 Well, what courts have done a lot of times is to allow  
15 the -- to require the defense to give all of whatever is going  
16 to be used in their cross-examination to the government perhaps  
17 right before the end of their testimony. And that means we can  
18 show the jury how the person has lied without allowing him to  
19 change his testimony before.

20 I know the government may find it frustrating. They  
21 may not agree with us that the witness is lying. But that of  
22 course is our job, to be able to show how he has lied. And we  
23 can either show it in a straightforward way before the jury or  
24 we can show it in a very convoluted, time-consuming way that  
25 will require at least three more witnesses to be called.

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1           So we would ask, to the extent we are using documents  
2 to show on cross-examination that the witness is lying, that we  
3 not be required to give those documents or to specify those  
4 documents to the government until towards the end of the  
5 witness's cross-examination so the witness cannot be prepped on  
6 those documents and we are allowed to show the jury his  
7 reaction to those.

8           That being said, there are other documents, such as  
9 the tapes, or such as documents which go to the sort of broader  
10 themes -- there are themes -- of the reasons why he is lying,  
11 that we will endeavor to provide a list of what we intend to be  
12 using.

13           THE COURT: Thank you.

14           Counsel for the United States, how do you respond to  
15 that proposal? As I understand it, the defense will produce  
16 exhibits related to exhibits with the exception of the  
17 documents used for impeachment cross-examination which they  
18 propose to provide at some point during the direct examination  
19 of the witness.

20           MS. RAVENER: One moment, your Honor.

21           THE COURT: Please.

22           MS. RAVENER: Your Honor, my concern from listening to  
23 Ms. Necheles's presentation is that the exception would swallow  
24 the rule.

25           What we are asking for is to the extent the defense

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1 intends to introduce a document or other record into evidence  
2 in this case that they provide that to us in advance, and in  
3 two ways.

4 First, Ms. Necheles has now admitted that the defense  
5 has in their possession documents that they may use and seek to  
6 introduce into evidence in this case that they have not turned  
7 over as reciprocal discovery. That is improper, your Honor.  
8 We would ask that those items be disclosed to us as reciprocal  
9 discovery.

10 Separately, we would ask that a deadline be imposed  
11 for a defense exhibit list which would reflect items that they  
12 intend to introduce into evidence. We are not asking for all  
13 possible impeachment material. We are asking to the extent  
14 that they know that they intend to use something as affirmative  
15 evidence in this case that they provide us notice of that so we  
16 can assess any issues.

17 I think it's outrageous, in the context of this case,  
18 to suggest that the defense doesn't have ample notice. We are  
19 willing to do more to ensure that they have ample notice of our  
20 exhibits, but we have made our exhibit list available to them  
21 now in excess of a month. They would have had it for six  
22 months by the time this trial occurs, which is extraordinary.

23 They will have had 3500 material for Mr. Rechnitz  
24 since the Seabrook trial, which would have occurred a year  
25 prior to this trial, your Honor.

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1           This is truly a situation in which the defense has  
2           access to more material, more Giglio material, 3500 material,  
3           more discovery in so many respects of the government's case  
4           than any other certainly that I have been a part of or heard of  
5           frankly in this district at this point.

6           So I think given the delay, which we agree is  
7           unfortunate and we take complete responsibility, your Honor,  
8           for the issue that have arisen with respect to the wire and are  
9           working diligently to address anything else that may arise, but  
10          to suggest that the defense doesn't have time to develop and  
11          respond to this request for an exhibit list in advance of this  
12          trial, it doesn't make sense.

13          To the extent there is any confusion about the  
14          government's exhibits, which we dispute, we have provided  
15          answers to those questions. We did provide a detailed list,  
16          including with respect to the electronic evidence seized. We  
17          will go back through that, and we are willing to provide marked  
18          exhibits to the defense well in advance of this trial to ensure  
19          that there is no confusion about the government's case.

20                 THE COURT: Thank you. Let me pause on that.

21          I understood the government was going to be going back  
22          and looking at the exhibits to determine whether or not there  
23          were subsets of certain of the exhibits that should be  
24          designated specifically.

25                 Has the United States done that or is that something

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1 that is still in process?

2 MS. RAVENER: I can tell you that we did do that. We  
3 provided a list to the defense. That is the list Ms. Necheles  
4 is saying is still inadequate.

5 I can tell you, your Honor, there is a certain degree  
6 to which -- and the defense is within their rights to do this.  
7 There will be an issue raised about everything we do in this  
8 case, and they may do that. But that doesn't mean that all of  
9 these issues are legitimate.

10 To the extent that a list doesn't give them enough  
11 information, we will provide the documents. I can tell you  
12 that it's incredibly resource intensive for us to ensure that  
13 we go through and comb and collate the right pieces of the  
14 electronic device exhibits so that they are presented in a  
15 reasonable manner to the jury. We were in the process of  
16 developing summary charts that we were intending to use at  
17 trial and we halted that process in light of the adjournment.  
18 We have slowed it down, but it doesn't mean it's stopped.

19 We have no problem completing that process in a  
20 thorough manner and getting these exhibits to the defense. I  
21 would propose one month in advance of trial to ensure they can  
22 see them, touch them, assess whether there are any issues, and  
23 make sure that we have a smooth process here because this trial  
24 should be about the merits.

25 THE COURT: Can you tell me when you propose that the

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1 defense produce an exhibit list of substantive exhibits that  
2 they intend to introduce as part of their case in chief,  
3 whether it's part of cross-examination or otherwise.

4 MS. RAVENER: I think at least two weeks would be more  
5 than reasonable.

6 THE COURT: Thank you.

7 MS. NECHELES: Let me just note this is the time that  
8 we specifically asked the government weeks ago for Bates  
9 stamped numbers, identification, and have heard radio silence  
10 from the government. So we do try to raise these issues with  
11 the government. They don't necessarily get back to us on them.

12 We agree that after the government gives us their  
13 list, a real list, we will be able to respond with a pretty  
14 substantive list. I will say at this point the government is  
15 wrong. There is not a document that I have in my possession  
16 that I intend to introduce in evidence. Because if the  
17 government doesn't put anything in, I am putting zero in. I am  
18 totally reactive. The government has the burden. I am only  
19 putting in stuff if they put it in.

20 So because I don't have the knowledge of what exactly  
21 they are going to have their witness testify to, I have no  
22 intention of introducing anything in evidence at this point. I  
23 have received materials from other sources, some of which are  
24 very unhelpful to me. So I would never be producing those. I  
25 will be producing to the government what I intend to introduce

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1 in evidence, but part of it depends on what their witness will  
2 be testifying to and what will be on their witness list.

3 Your Honor, I would suggest that their witness list  
4 get to me a month before trial because it would make it easier  
5 for me to give them a witness list.

6 MS. RAVENER: To be clear, they have our lists. Those  
7 are still our lists. If we amend them, we will update them no  
8 later than one month before the trial.

9 MS. NECHELES: They are exhibit lists. I am telling  
10 you, I don't know what they are putting in from their --

11 THE COURT: Let me do this. Counsel for the United  
12 States, I will ask that to the extent there is specific, I will  
13 call it sub-elements of the productions from the electronic  
14 devices, which I understand previously have been marked as  
15 exhibits, that you intend to introduce as exhibits, that you  
16 identify those with specificity to the defense no later than  
17 five weeks prior to trial. My hope is you will be able to mark  
18 those as specific exhibits to the extent you intend to  
19 introduce them.

20 I understand there may be also summary charts that the  
21 government is planning to produce. To the extent those are  
22 also available on that time line, it will be helpful for you to  
23 disclose them.

24 I am also going to direct the defense to provide the  
25 government with the exhibits that it intends to introduce as

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1 substantive evidence as part of its case in chief, whether  
2 that's during cross-examination of the government's witnesses  
3 or otherwise. I think that will help the case proceed  
4 efficiently. It will allow me to hear whatever evidentiary  
5 issues that may arise through motions or the like and therefore  
6 use the jury's time efficiently.

7 I am going to direct that the defense provide those  
8 exhibits and your exhibit list no later than three weeks prior  
9 to the close of trial.

10 Good. I will issue a separate order that requires  
11 each of those things.

12 MS. RAVENER: If we could just clarify. Do you intend  
13 to say the defense exhibit list will be three weeks prior to  
14 trial?

15 THE COURT: Yes. If I didn't say that, that is what I  
16 intend.

17 Now, I would like to talk --

18 MS. NECHELES: With respect to the summary charts by  
19 the government, those will also be five weeks? I am concerned  
20 about those.

21 THE COURT: That is my expectation.

22 Now, as I said during our last conference, I would  
23 like to revise the approach that we are planning to take  
24 regarding the questionnaire.

25 Principally what I would like to do is to I think



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1 basically front load a lot of the voir dire with a more  
2 substantive questionnaire. I have been looking at other  
3 exemplars of questionnaires. Particularly I have been looking  
4 at the questionnaire that Judge Caproni used in the recent  
5 Silver trial. In essence, what she did was include essentially  
6 all of the substantive questions from the voir dire in the  
7 questionnaire. So the questionnaire was extensive.

8 What they did after providing that questionnaire to  
9 prospective jurors was lawyers conferred regarding exercise of  
10 challenges for cause, and then the only element of voir dire  
11 that took place, I will call it, live were the questions for  
12 individual jurors, that subset of questions together with any  
13 follow-up questions for individual jurors who had not  
14 previously been stricken for cause.

15 That allowed Judge Caproni to seat a jury in a day for  
16 the Silver case, which is really amazing.

17 I don't think that this case has the same degree of  
18 prominence, but I think that it would be very helpful for us to  
19 do that here. It would simplify the process. And we have more  
20 time to do it in that way. I also think it will be beneficial  
21 because we have the gap in the beginning part of that week and  
22 my hope is that we can get the questionnaire reviewed by our  
23 pool early in that week so that responses can be reviewed by  
24 counsel prior to the Thursday. So we can have a selected pool  
25 of jurors for the voir dire later in the week.

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1 I haven't talked to the jury clerk about this  
2 specifically, our Thursday start date, so I don't know all the  
3 nuances yet. But I would like for someone to work on creating  
4 such a questionnaire. My hope was that the United States might  
5 have a helpful intern that could do that work at some point  
6 over the summer.

7 Counsel for the United States. First, what is your  
8 view regarding the proposal generally and, secondly, can you  
9 take on the laboring oar if it's acceptable?

10 MS. LONERGAN: With respect to the first question,  
11 yes.

12 Second question, one modification of the court's  
13 proposal. We think that there are some questions in the  
14 proposed voir dire that are more sensitive. I would include  
15 off the top of my head questions such as interactions with  
16 police. I think feelings about the Hasidic community that we  
17 think are actually not appropriately dealt with in a  
18 questionnaire because most likely will require follow-up  
19 questions from the jurors.

20 Our proposal would be to include many of the more  
21 basic questions in such a questionnaire, but to perhaps omit,  
22 and we can confer with defense counsel which questions we think  
23 fall into this category, the questions that actually are likely  
24 to require follow-up colloquy at a sidebar. And although that  
25 could delay things a little bit, we understanding the point is

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1 to get it done.

2 THE COURT: Let me say, I think that proposal is  
3 completely reasonable and I will just ask that you confer with  
4 the defense regarding which questions you think should be moved  
5 into the individual colloquy component of the voir dire.

6 I should say another benefit of the process that Judge  
7 Caproni used was that, as I understand it, they called in  
8 individual jurors individually to be questioned regarding those  
9 individual questions, not at sidebar but in open court, while  
10 the other jurors were in a different room. I think that would  
11 be beneficial.

12 I think that there is likely going to be press  
13 interest in the process, among other things, and that allows us  
14 to do the process in a way that's very transparent, and it  
15 also, I hope, will streamline the process. I haven't done it  
16 before, but it sounds conceptually like a good approach.

17 So counsel for the United States, I would like to ask  
18 you to please take the version of the voir dire questions that  
19 we have now, modify them as you suggest, confer with the  
20 defense and then provide me with a revised version of the  
21 questionnaires. There is no rush on this, but I would like to  
22 set a deadline by which that will be worked through by the  
23 parties.

24 What would you like to propose?

25 MS. LONERGAN: We would propose four weeks before

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1 trial.

2 THE COURT: Counsel for defendant, is that acceptable  
3 to you?

4 MS. NECHELES: It is acceptable. I would prefer to do  
5 it earlier just so it's out of the way.

6 THE COURT: I agree. Can we do it sooner, United  
7 States?

8 MS. LONERGAN: Sure. That's fine.

9 THE COURT: Tell me what you propose.

10 MS. LONERGAN: Let's say mid-August.

11 THE COURT: Fine. I will set a date around mid-August  
12 for you to present that to me. Thank you very much for working  
13 on this. I in turn will talk to the jury clerk about these  
14 issues. There are a few issues that I need to rule on  
15 subsequently, namely, the subpoena and motions in limine. But  
16 I will propose to take that up at a subsequent conference,  
17 which I will schedule in the order setting the trial.

18 Anything else that we must discuss now?

19 Counsel for the United States.

20 MS. RAVENER: No, your Honor.

21 THE COURT: Counsel for Mr. Reichberg.

22 MR. MERINGOLO: Nothing from Mr. Grant.

23 MS. NECHELES: No, your Honor.

24 THE COURT: Thank you, all.

25 (Adjourned)